

ORIGINAL TRANSCRIPT

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, CENTRAL DIVISION

In re:

PLAY BEVERAGES, LLC,
Debtor.

Case No. 11-26046

Judge Joel T. Marker

TRANSCRIPT OF ELECTRONIC RECORDING

December 6, 2012 * 10:06 a.m.

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P R O C E E D I N G S

THE CLERK: All arise. The United States Bankruptcy Court for the District of Utah, Central Division, the Honorable Joel T. Marker presiding, is now in session. God save the United States of America and this honorable court.

Please be seated.

THE COURT: Good morning. Please call the calendar.

THE CLERK: This is in the matter of Play Beverages, LLC.

THE COURT: Could I get appearances, please?

MR. BOLEY: Your Honor, Matthew Boley and Brian Benevento on behalf of the debtor.

MR. FERICKS: Your Honor, Russell Fericks on behalf of CirTran Beverage Corporation.

MS. CAYTON: Laurie Cayton for the U.S. Trustee.

MR. BECKETT: Tom Beckett and Michael Young for the petitioning creditors.

MR. WEISS: Chris Weiss and Danny Kelly for Playboy Enterprises International, Inc.

THE COURT: Thank you.

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1 Mr. Boley.

2 MR. BOLEY: Your Honor, I believe that
3 when we broke Mr. Miller was on the stand, and I was
4 questioning him. So we'd like to put him back on the
5 stand for a few final questions before I tender the
6 witness.

7 THE COURT: All right.

8

9 GIL A. MILLER

10 called as a witness, having been duly sworn, was
11 examined and testified as follows:

12

13 THE CLERK: Have a seat at the witness
14 stand and state your name for the record.

15 THE WITNESS: My name is Gil A. Miller.

16

17 CROSS-EXAMINATION (CONT.)

18 BY MR. BOLEY:

19 Q. Mr. Miller, you understand you're still
20 under oath?

21 A. Yes.

22 Q. Well, I guess you just took a new oath.

23 Let me ask a question that came up during
24 the testimony yesterday, and that is whether there's
25 been an analysis of CirTran Beverage Corp's claim

1 against the debtor by you or your office?

2 A. There has been.

3 Q. And what was done to investigate and
4 analyze that claim?

5 A. We reviewed the transfers that -- or the
6 payments that have been made or expenses rendered by
7 CBC on behalf of the debtor to try to get an
8 understanding of what advances had been made on
9 behalf of the debtor. And we did so for the period
10 of time since about 2008 forward and tried to
11 determine and put category of dollars into buckets as
12 to whether it was reasonable, not reasonable, whether
13 we had questions about it, et cetera. And we met
14 extensively with CirTran's accountant to understand
15 why things were booked. And I also had discussions
16 with the audit partner, Bob Bowen at Hansen Barnett
17 who performed the CirTran Public Audit.

18 Q. And what did you conclude after this
19 analysis and investigation?

20 A. I concluded that the charges that the
21 debtor was -- were charged with appeared reasonable.
22 And while we did not do a complete audit of every
23 single transaction because there were thousands, I
24 took great comfort in the fact that I'd spoken with
25 the independent auditor regarding their procedures.

1 I also took comfort in the fact that at the end of
2 the day I required over a \$3 million write-off to be
3 made before I settled with CBC. And within that
4 \$3 million I kind of, to be quite honest, said to
5 myself if I've missed a few things or if things
6 didn't come out in our review, they've almost written
7 off half of their debt. And I felt pretty good about
8 the fact that I wasn't concerned that I'd missed an
9 item or two, which could possibly be the case.

10 Q. You're referring to the settlement that's
11 contingent on court approval?

12 A. Yes.

13 Q. Let me move your attention to the trade
14 debt in this case. That's been mentioned during
15 testimony in opening statements. Have you had a
16 chance to analyze the claims register in this case?

17 A. I have.

18 Q. And how many purported trade creditors
19 have filed proofs of claim?

20 A. As far as I can tell, three.

21 Q. Now will he let's discuss those. One of
22 those claims was filed by general distributors. Are
23 you familiar with that?

24 A. That is correct.

25 Q. And have you done any investigation or

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1 analysis of that claim and its validity?

2 A. I have.

3 Q. And what is your preliminary determination
4 regarding that claim?

5 A. That claim, which is just over \$65,000, I
6 believe to actually be a CBC debt, not a debt of Play
7 Beverages. And that's been confirmed as well with
8 Rachel Williams who works with CirTran, and she's
9 told me that it -- or I've seen evidence from her
10 saying that it is a CBC debt.

11 Q. And does CBC dispute that debt, do you
12 know?

13 A. It is very disputed.

14 Q. So the debtor disputes it because it's a
15 CBC debt, and CBC apparently disputes it on the
16 merits?

17 A. Correct.

18 Q. A second claim was filed by Fed Ex
19 Freight. What can you item the court about that
20 claim?

21 A. The Fed Ex Freight claim is for just over
22 \$36,000, and the story is the exact same as the
23 general distributors. Although I don't know if it's
24 disputed. I do know that my investigation would led
25 me to believe it is a debt of CBC and that, again,

1 Rachel Williams from CirTran has confirmed that.

2 Q. And then the third trade debt claim filed
3 was by Adrenalin Y2K. What is -- what's the result
4 of your preliminary investigation regarding that
5 claim?

6 A. Two things, number one again that it is a
7 CBC debt, again confirmed by Rachel Williams from
8 CirTran as a CBC debt; and secondly, it may have
9 already been paid by either CirTran or by
10 Mr. Hawatmeh personally. I'm not certain yet. But
11 either way, it doesn't appear to be a debt of the
12 debtor.

13 MR. BOLEY: Thank you, Mr. Miller.

14 Your Honor, I tender the witness.

15 MR. BECKETT: I have no questions.

16 THE COURT: Ms. Cayton.

17

18 CROSS-EXAMINATION

19 BY MS. CAYTON:

20 Q. Mr. Miller, do you believe that the debtor
21 currently has the need for the automatic stay which
22 is provided in the bankruptcy case in the Chapter 11?

23 A. If it remains in Chapter 11, I certainly
24 wouldn't turn it away. But if it -- if the case is
25 dismissed, no, I think the remedies are out there

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1 that I don't think they need the protection.

2 Q. In order to accomplish what the debtor
3 hopes to accomplish through its lawsuit against
4 Playboy, do you view a necessity for the debtor to be
5 in Chapter 11?

6 A. Not a necessity.

7 MS. CAYTON: Thank you.

8 THE COURT: Mr. Fericks, anything?

9 MR. FERICKS: No questions, your Honor.

10 MR. WEISS: Your Honor, Playboy has no
11 questions consistent with docket number 434 from our
12 statement.

13 THE COURT: Thank you, Mr. Weiss.

14 Mr. Miller, you may step down.

15 THE COURT: Mr. Beckett, any other
16 evidence.

17 MR. BECKETT: I do have three rebuttal
18 impeachment exhibits, and I would like to recall for
19 rebuttal Mr. Hawatmeh.

20 MR. BOLEY: Your Honor, the debtor
21 objects. Now is not the time for rebuttal. The
22 debtor has not put on its case. We intend to make a
23 motion for judgment as a matter of law based on the
24 evidence that petitioning creditors put on during
25 their case in chief.

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1 MR. BECKETT: And I didn't mean to
2 intervene. I just meant to be responsive.

3 THE COURT: All right.

4 Go ahead, Mr. Boley.

5 MR. BOLEY: I suppose I should assume
6 that -- your Honor, before I begin I'd like to
7 clarify my understanding, perhaps you can clarify
8 with the other parties, that the petitioning
9 creditors have rested and the U.S. Trustee has
10 rested.

11 MR. BECKETT: Yes.

12 MS. CAYTON: That's true.

13 MR. BOLEY: Thank you, your Honor.

14 MR. BOLEY: As I stated in opening,
15 conversion of a case from Chapter 11 to Chapter 7 is
16 an extraordinary remedy. That's why the courts
17 employ a heightened standard of proof, clear and
18 convincing, for appointment of a trustee. That
19 standard has not been met in this case based on the
20 evidence presented during petitioning creditors' case
21 in chief.

22 Regarding cause, the evidence has shown,
23 first, that the debtor is actively prosecuting the
24 case.

25 Second, that the bankruptcy estate is not

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1 experiencing a continuing diminution, let alone one
2 that would be cured by conversion to Chapter 7 or the
3 appointment of a trustee.

4 Third, that the debtor is able to fund
5 litigation against Playboy, and a Chapter 11 plan
6 centered on that litigation is feasible.

7 Fourth, that the funding the debtor has
8 arranged would not be available to a trustee.

9 Fifth, the debtor is better able to pursue
10 recoveries for creditors than a Chapter 7 Trustee.

11 Seventh, that the debtor is able to fund
12 payment of ongoing administrative expenses to its
13 professionals.

14 And Eighth, in contrast, conversion of the
15 case likely would lead to administrative insolvency.
16 That's been the evidence on cause.

17 THE COURT: All right. Let's go back
18 through that again. One, the debtor is actively
19 prosecuting the case.

20 MR. BOLEY: Yes, your Honor.

21 THE COURT: Two?

22 MR. BOLEY: Two, the bankruptcy estate is
23 not suffering a continuing diminution or a
24 significant loss, let alone one that would be cured
25 by conversion.

1 Three, the debtor is able to fund
2 litigation against Playboy, and a Chapter 11 plan
3 centered on that litigation is feasible.

4 Four, that that funding is not available
5 to a trustee.

6 Five, that the debtor is better able to
7 obtain recoveries for creditors than a trustee.

8 Six, it's not likely that a bankruptcy
9 trustee could fund or pursue litigation against
10 Playboy.

11 Seven, the debtor has been able to fund
12 payment of its administrative expenses to
13 professionals.

14 And eighth, in contrast, conversion would
15 likely lead to administrative insolvency. That's the
16 evidence on cause.

17 Let's move beyond cause and discuss how
18 the evidence impacts the Court's consideration of
19 what it would do if cause existed. The evidence has
20 answered the question I posed at the beginning of
21 this trial, which is what good would conversion do?
22 And the answer that the evidence demonstrates is
23 none. The evidence shows that conversion to Chapter
24 7 will not prevent diminution. Rather, as Mr. Miller
25 testified, conversion would make a significant loss

1 and diminution to the estate certain.

2 The evidence shows that a Chapter 7
3 Trustee is not well situated to pursue recoveries on
4 litigation claims, which is the principal remaining
5 asset of the debtor. The evidence shows that
6 continued bankruptcy oversight and bankruptcy
7 administration are not necessary. Specifically,
8 bankruptcy protections are not necessary to preserve
9 the debtor's assets which consist largely, if not
10 entirely, of litigation claims. Nor is bankruptcy
11 oversight protection necessary to protect creditors.
12 The evidence shows there are very few creditor
13 constituencies. The evidence further shows that
14 those limited creditor constituencies are able to
15 protect their rights through ordinary state law
16 remedies. As such, dismissal versus conversion is
17 entirely appropriate.

18 Assuming for the sake of argument that
19 continued bankruptcy oversight protection were
20 necessary, the evidence shows that this case should
21 stay in Chapter 11 with the debtor in possession, and
22 that is within the Court's discretion pursuant to the
23 case law section 1112.

24 With respect to some of the specific
25 elements that the cases discuss in consideration

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1 conversion versus dismissal, the evidence does not
2 show that there are any low-hanging fruit preference
3 claims here. The evidence was that arguably there's
4 a preference claim against Playboy as to which
5 Playboy would assert a new value defense. And
6 arguably there are preference claims against the
7 petitioning creditors, and those claims would be
8 dependent on successfully characterizing them as
9 insiders.

10 There's no evidence of any rights that
11 have been granted in the case that would be lost if
12 the case is dismissed. There is no evidence that the
13 debtor will refile the case if it's dismissed, rather
14 than converted. In fact the debtor has stipulated in
15 it's opening, and I'll stipulate again now, that the
16 debtor would agree to 180 day lockout in order of
17 dismissal.

18 The evidence does not support a conclusion
19 that conversion will maximize the estate's value as
20 economic enterprise. Quite the contrary, Mr. Miller
21 testified that conversion would destroy the estate's
22 value as an economic enterprise. The evidence does
23 not support a finding there are issues and disputes
24 that would be better resolved by this forum than in a
25 state court forum. Finally, there's no evidence of

1 misconduct by the debtor pre or postpetition.

2 So in summary, your Honor, although the
3 debtor posits that cause does not exist, the debtor
4 does stipulate to dismissal. Why? Because the
5 debtor concedes that continued bankruptcy protections
6 in this case are not necessary. The automatic stay
7 is not necessary. The bankruptcy oversight,
8 bankruptcy administration are not necessary. The use
9 of public resources that bankruptcy entails your time
10 and the time of the U.S. Trustee's office aren't
11 necessary in this case.

12 As such, the Court can enter an order of
13 dismissal without even making a finding of cause.
14 Alternatively, the Court could conclude that based on
15 the debtor's stipulation and the evidence that
16 supports, there is no longer a need for bankruptcy
17 oversight and protection. That cause exists to
18 dismiss, although that same cause would not support
19 conversion. Your Honor, that's the debtor's motion.
20 We ask the Court to dismiss the case.

21 THE COURT: Thank you.

22 Ms. Cayton, could I hear from you?

23 MS. CAYTON: Your Honor, the parties
24 present, Playboy and the petitioning creditors, are
25 well represented. We are here and looking at the

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1 interests of other unsecured creditors as well. And
2 Mr. Miller has just testified that the three of those
3 creditors who have filed proofs of claim appear to be
4 CBC creditors and perhaps disputed. There are some
5 additional unsecured creditors who are listed on the
6 schedules who were not listed as disputed, so it's
7 not certain they -- there was necessity for them to
8 file a proof of claim since they weren't listed as
9 disputed contingent or unliquidated. So there may be
10 some other interests still here that I'm attempting
11 to consider and represent.

12 Although the debtor has recently provided
13 a plan, the plan basically just calls for the
14 liquidation that it's commenced. And then if they're
15 successful, a distribution to creditors based upon
16 that. The 16 months that the debtor has been in
17 Chapter 11 has not provided a positive result. I
18 think we were all hoping that the plan proposed and
19 set for confirmation earlier this fall would occur,
20 but it did not.

21 The debtors argue there's no continuing
22 loss. However, I believe if you look at the
23 financial position of the debtor when the involuntary
24 was filed and also at the time of the order for
25 relief was entered, the license was certainly in a

1 less precarious position and the debtor was -- but we
2 don't know what the forth quarter holds. The
3 evidence is a little unclear, since we don't have an
4 October financial report, what's happened as a result
5 of confirmation falling apart and whether
6 distribution has continued at a good rate. And it's
7 a little frustrating that we don't know that at this
8 point.

9 The argument is made a trustee could not
10 fund litigation. I believe that's true. There are a
11 lot of assets that I went through with Mr. Hawatmeh
12 that are mostly contingent upon the trustee finding
13 someone to take a case on a contingency fee basis or
14 putting their own resources and law firm at risk.
15 There was mention of a judgment of \$300,000 that the
16 debtor had obtained a creditor but some question as
17 to whether it would be collectable. I see this as a
18 case in which the trustee, were it to be converted,
19 would be looking for the best offer it could find to
20 purchase the lawsuit against Playboy and any of the
21 lawsuits it felt may have some value. It may be that
22 Playboy would come in with the best offer on that.

23 Based on the evidence that we've seen and
24 heard, the U.S. Trustee believes that there is cause
25 for the Court to find it's appropriate at this time

1 under 1112(b) for the case to be converted or
2 dismissed. And we would recommend dismissal of the
3 case.

4 THE COURT: Thank you.

5 I didn't hear any evidence of any
6 self-dealing by Mr. Hawatmeh or any other party that
7 would generally be a consideration weighing in favor
8 of conversion to appoint somebody to protect the
9 interest of creditors. Did you hear anything that
10 I'm missing?

11 MS. CAYTON: I did not. And frankly, the
12 fact that Mr. Miller has been in place since last
13 November, so over a year, with the opportunity to
14 review and comment on whether he believed there was
15 any self-dealing going on and that was not the
16 testimony, I don't believe that to be the case.

17 THE COURT: Mr. Fericks, did you have
18 anything?

19 MR. FERICKS: Your Honor, we just concur
20 with the comments of Mr. Boley, and anything we would
21 add at this stage would just be piling on.

22 THE COURT: All right.

23 Well, before Mr. Beckett addresses the
24 court, Mr. Weiss, do you have anything you want to
25 say?

1 MR. WEISS: Your Honor, again, we would
2 reaffirm our reliance on docket number 434.

3 THE COURT: Thank you.

4 MR. BECKETT: Morning, your Honor.

5 The first part of the analysis, as I've
6 described and as the Court knows better than I, is
7 whether there's cause to do one or the other. The
8 petitioning creditors believe that cause has been
9 shown. There has been a substantial diminution of
10 the estate simply by virtue of the loss of the
11 Playboy license, and there is no likelihood of
12 rehabilitation. Rehabilitation is different from
13 reorganization.

14 And if I may, let me just read a quick
15 quote from in re Brusch [phonetic] 476 BR 2908 United
16 States Bankruptcy Court, District of New Mexico. The
17 court writes that section 1112(b)(4)(a) requires that
18 a debtor who has incurred substantial or continuing
19 losses to have a reasonable likelihood of
20 rehabilitation. Rehabilitation is different and,
21 unfortunately for the debtor, a much more demanding
22 standard than reorganization.

23 Judge Starzinski then quotes Collier.
24 "Rehabilitation is not another word for
25 reorganization. Rehabilitation means to reestablish

1 a business. Whereas confirmation of a plan would
2 include a liquidation plan, rehabilitation does not
3 include liquidation."

4 So there's cause. And then the question
5 turns to dismissal as opposed to conversion. And I
6 want to start out, honestly, I apologize, my clients
7 aren't here. If that was a mistake, that's my fault.

8 THE COURT: No offense was taken. I was
9 just noting for the record that they're not.

10 MR. BECKETT: Well, please don't hold that
11 against them. That's my responsibility.

12 The argument between whether conversion is
13 appropriate or dismissal is appropriate is really at
14 its face a legal argument. It's not something that
15 people testify to. It's a question of what's more
16 appropriate, a trustee on the one hand or a state
17 court system on the other hand. So that's my fault.

18 The question then is, very briefly, to
19 take a look at what those two things entail. The
20 petitioning creditors hierarchy goes like this:
21 Conversion to Chapter 7 is first appropriate,
22 remaining in Chapter 11 would be second, and
23 dismissal would be third.

24 Dismissal, let me address that first, is
25 third because this debtor has not paid its creditors

1 under that system of state law enforcement. And the
2 problem is the wall. And it doesn't matter who's
3 fault the wall is, I tried to argue and I think the
4 evidence showed that, for whatever reason somebody
5 who owns the company that I now represent in a
6 previous capacity signs some agreements that created
7 a wall. It may have made sense at the time. And
8 the -- but when Mr. Hawatmeh came to be both sides of
9 the wall, as he conceded, that's when the wall was
10 really constructed large and that's what kept
11 creditors from being paid.

12 In the event of dismissal, Play Bev is
13 going to go out and do business and have creditors,
14 and they will not be paid because of the wall. I
15 think the evidence showed that Play Bev is simply a
16 division of CBC. Play Bev is going to go out into
17 the world, into the state law world and take
18 advantage and CBC will take advantage of Play
19 Bev's -- the legal fiction of Play Bev's corporate
20 independence. There will be more creditors, existing
21 creditors will not be paid.

22 In a Chapter 7, which is preferable, I
23 think a fiduciary trustee can take a look at what the
24 wall is comprised of and look at it differently than
25 an employee of Play Bev would look at it. He would

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1 look at it differently than an employee of Play Bev
2 would look at it.

3 And the -- the claim can be prosecuted
4 because it -- the trustee can borrow money from the
5 same people who were now willing to lend to the
6 debtor. They can have a lien on the recovery for
7 their recovery. I don't see a problem with that
8 under 364. The trustee could prosecute it if people
9 step up and want to pay for that. The trustee could
10 sell it, and it could sell for a lot or it could sell
11 for a little. If it is not going to sell for a lot
12 and if it is going to be too expensive to prosecute,
13 then the trustee may abandon the claim. And in which
14 case, the debtor can get funding for the prosecution
15 of the claim and there can be a recovery and there is
16 a lien by CBC on the assets of the debtor and the
17 estate has claims against CBC.

18 I think the evidence is certain that
19 conversion -- I think the evidence is certain that
20 there should be conversion or dismissal. And I think
21 that with respect to dismissal or conversion it would
22 be appropriate to hear the debtor's case to
23 understand better what they intend to do with this
24 before finalizing the argument on which of those
25 alternatives is appropriate.

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1 THE COURT: Anyone else? All right. I'm
2 going to take a break recess.

3 THE CLERK: All arise.

4 (Break taken from 10:35 to 11:15 a.m.)

5

6 THE CLERK: All arise. The Court resumes
7 its session. Please be seated.

8 THE COURT: All right. Thank you.

9 The debtor has made a motion to dismiss
10 the Motion by the Petitioning Creditors to Convert or
11 Dismiss the Case. The debtor has stipulated to
12 dismissal. And the United States Trustee has -- what
13 were the exact words you used, Ms. Cayton? You agree
14 with that?

15 MS. CAYTON: That is my recommendation,
16 yes.

17 THE COURT: U.S. Trustee recommends
18 dismissal as well.

19 This case was commenced by an involuntary
20 petition by the involuntary petitioning creditors on
21 April 26th, 2011 as a Chapter 7 case.

22 On June 8th, 2011, the debtor filed a
23 Motion to Dismiss.

24 Petitioning creditors responded on
25 July 5th, 2011, by identifying the Playboy license as

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1 the foundational asset in this case. They were
2 quoting the Debtor's Motion to Dismiss, but they
3 adopted that position as well, and I agree.

4 On August 12th, 2011, the debtor withdrew
5 its Motion to Dismiss, consented to entry of an Order
6 for Relief, and the case was converted to one under
7 Chapter 11.

8 On October 6th, 2011, Playboy filed a
9 Motion to Convert the case or to appoint a Chapter 11
10 Trustee.

11 On October 28th, 2011, the debtor filed
12 its motion to employ Mr. Miller's firm and Mr. Miller
13 as the restructuring officer.

14 And on November 9th, 2011, the debtor and
15 Playboy entered into a stipulation which continued
16 the Motion to Convert or Appoint a Trustee without
17 date and set up a framework that was for an agreement
18 between the parties that was worked on for the next
19 nine or ten months, in good faith I find.

20 On August 21st, 2012, the debtor filed a
21 Plan of Disclosure Statement that was premised upon
22 an infusion of capital in the amount of \$2 million to
23 cure the license obligations to Playboy.

24 That money didn't come through as
25 anticipated. And on September 21st, 2012, the debtor

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1 cancelled the hearing on confirmation of that
2 particular plan.

3 On October 18th, 2012, I sent an order
4 setting a status conference. And based upon that
5 order, the petitioning creditors filed a Motion to
6 Reconvert the case to Chapter 7, and the U.S. Trustee
7 filed a Motion to Convert or Dismiss the case based
8 upon some administrative issues, which I think have
9 been resolved since.

10 I heard the testimony yesterday and
11 finishing up this morning from Mr. Hawatmeh, manager
12 of the debtor, and Mr. Miller, the CRO. I found
13 their testimony to be credible and helpful to me in
14 understanding the relationship between the debtor and
15 CirTran Beverage Corporation. The petitioning
16 creditors have complained mightily about the dam or
17 the wall set up by the agreements between the debtor
18 and CBC. But the evidence clearly showed that Mr.
19 Pollock, who is a member of one of the petitioning
20 creditor entities, was the signatory on that
21 document, the master distribution agreement, that set
22 up the financial relationship between the parties.

23 There was no evidence that Mr. Hawatmeh
24 somehow prepared the documents to stop the debtor
25 from getting the cash that it needs to pay its

1 obligations.

2 The September 2012 monthly operating
3 report, which came in as Exhibit PCF, showed the
4 royalties due from Cirtran in the amount of
5 \$8 million and the obligation by the debtor back to
6 CirTran, CBC, in the amount of \$14 million.

7 Mr. Hawatmeh testified, and it makes sense
8 to me, that those are shown as accruals and the
9 debtor doesn't really have an asset from CBC. It
10 simply owes CBC money under the agreement.

11 CBC has undertaken and gone into debt
12 itself millions of dollars. I think the testimony
13 was that the amount owed by the debtor to CBC right
14 now is about \$8 million for distribution,
15 manufacturing and marketing expenses that it
16 incurred, again the evidence shows in good faith,
17 trying to get this product up and running.

18 The amendment to the loan agreement in
19 March of 2008 shows that the loan went from \$1
20 million -- the loan from CBC to the debtor went from
21 one million to \$3 million. Mr. Hawatmeh explained
22 why that was necessary and then explained how the
23 debt from -- the debt of the debtor to CBC rose to
24 its present position of approximately seven or
25 \$8 million.

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1 Mr. Hawatmeh testified that the -- he
2 wouldn't admit that the debtor had no employees, but
3 it really doesn't have any employees. It's got
4 Mr. Hawatmeh as a manager and another manager and
5 Mr. Miller as a CRO. But none of them are being paid
6 by the debtor because the debtor doesn't have any
7 cash.

8 The monthly operating reports clearly show
9 that the only cash this company has had since it
10 started out in Chapter 11 have been very small
11 amounts, less than \$1,500, over the course of the
12 Chapter 11 portion of this case so that the debtor
13 could pay monthly -- the quarterly fees to the U.S.
14 Trustee's office. This company has no cash flow.

15 And while Mr. Miller testified from
16 Exhibit 1 that the debtor has revenues, those
17 revenues are all behind the wall. There is no cash
18 in this case. The debtor's foundational asset, the
19 license, while there was some dispute about whether
20 the debtor was performing its obligations when the
21 case was filed, that asset has become even more
22 precarious because of the failure of the debtor to
23 perform on its good faith negotiate agreement to cure
24 the license amounts as set forth in that August plan.

25 So there are no assets other than -- no

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1 material assets other than the lawsuit claim relating
2 to the license agreement. There are no buildings.
3 There's no equipment. There really are no employees.
4 And the debtor has conceded that there is really no
5 use for the administrative expense incurred in having
6 this case go forward as a Chapter 11 case.

7 The petitioning creditors, you know, the
8 case law is clear that I should take into account
9 their views, and I have. I just disagree with your
10 clients, Mr. Beckett.

11 I think this is one of those cases based
12 upon -- and I looked at Judge Starzinski's opinion,
13 and I agree with you. He says when a -- Judge
14 Starzinski said in the Bruschi [phonetic] case, 476 BR
15 298, in that case he said, "The debtor lacks a
16 profitable core around which to restructure a plan of
17 reorganization. The core of the debtor's
18 rehabilitation now is litigation. The debtor's
19 reliance that outcomes in pending litigation
20 favorable to it will cure its financial ills is pure
21 speculation."

22 And I don't mean that to be any finding on
23 the validity of the debtor's claims against Playboy,
24 but it's simply not something of substance upon which
25 to build a Chapter 11 plan.

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1 I agree with the debtor's arguments that
2 conversion in this case would not be in the best
3 interest for creditors. Mr. Beckett's argument that
4 a trustee in a Chapter 7 would find the resources
5 necessary to fund the litigation is without support
6 in the evidence that I received. And clearly the
7 petitioning creditors themselves have not offered to
8 fund that litigation. Mr. Hawatmeh testified that he
9 and those aligned with him would fund the litigation,
10 only if they remain in control.

11 There is no evidence in the case, either
12 prepetition or postpetition, that Mr. Hawatmeh has
13 engaged in any self dealing where a trustee might be
14 helpful to make recoveries for the benefit of the
15 estate. And there's no evidence of any material
16 claims under Chapter 5 of the bankruptcy code that a
17 trustee could use in order to establish a war fund to
18 go forward with litigation in Illinois.

19 So based upon my review of the record, the
20 debtor's stipulation to dismissal of this case with a
21 lockout for 180 days, which I'll take him up on, I
22 find that it's in the best interest of creditors. I
23 think cause has been established to either convert or
24 dismiss the case. I think it makes no sense
25 whatsoever, for creditors, for the case to be

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1 converted. There is no evidence that the debtor,
2 with Mr. Hawatmeh at the helm, would not treat its
3 creditors fairly outside of bankruptcy.

4 And so for all these reasons I'm going to
5 dismiss the case. Based upon this, the matters that
6 are set for hearing on Thursday, the 13th, will be
7 stricken.

8 And even though you didn't get your
9 preference, Mr. Beckett, I am granting your motion in
10 part. So I would like you to prepare an order simply
11 dismissing the case.

12 MR. BECKETT: Will do.

13 THE COURT: Mr. Kelly.

14 MR. KELLY: Yes. Playboy will -- now that
15 the Court has ruled, I would like to make a request.
16 And that simply is that the order specifically
17 provide that whatever property, especially the claim
18 that debtor asserted, is no longer property of the
19 estate. I don't think that the debtor would oppose
20 that. But simply that it's -- that claim is no
21 longer property of the estate.

22 THE COURT: Well, if the case is
23 dismissed, there is no estate.

24 MR. KELLY: Right.

25 THE COURT: So why would that be

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1 necessary?

2 MR. KELLY: Well, under 362 there is a
3 question as to whether a dismissal would apply in
4 some circumstances if property is of the estate. I
5 don't know -- I agree with your Honor, I don't know
6 what that means or why it's there. But I simply want
7 to make it clear that we -- that Playboy has to
8 defend itself against the claims. It has to protect
9 its rights, and we want to make sure that nothing
10 after dismissal or because of the dismissal will stop
11 us from doing that. The case is dismissed
12 immediately, and the automatic stay does not apply or
13 there's -- or simply that there is no -- whatever the
14 property is, that it's no longer property of the
15 estate. I think if we just say that, make it clear
16 for everybody, that would be helpful.

17 MR. BOLEY: Your Honor, if I may assist.
18 I think what Mr. Kelly is asking for --

19 THE COURT: And you can sit down. It's
20 more important to have you on the record than to
21 stand up.

22 MR. BOLEY: I'll come up here.

23 I think what Mr. Kelly is asking for, and
24 I'm not opposed to it, is just for the order to
25 confirm that the automatic stay is no longer in

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1 effect because the case is dismissed. And if that's
2 a concern, we can certainly add that verbiage to the
3 order that would address that.

4 And just to clarify the Court's ruling,
5 perhaps the order should also indicate that all
6 pending motions are denied as moot.

7 THE COURT: I think that would be helpful.
8 Thank you.

9 MR. BOLEY: And that the 2004 exam of
10 Mr. Miller will not go forward, is moot.

11 THE COURT: Well, I think that would be
12 all pending matters.

13 MR. BOLEY: Thank you, your Honor.

14 MR. BENEVENTO: Brian Benevento on behalf
15 of the debtor. Which I don't know if it's still
16 appropriate to address your Court with this question,
17 but I want to make sure that what Mr. Kelly is
18 suggesting doesn't in any way, shape or form prohibit
19 Play Beverage's LLC from pursuing its action.

20 And so I'm completely confused as to what
21 he said and what he's asking, but it sounded like he
22 wants a direction from this Court that whatever the
23 assets of the debtor are, are no longer their assets.
24 And so I don't understand this, but I want to make
25 sure that -- I'm urging the Court that I believe that

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1 there is a claim and that claim should be pursued.
2 And I also believe Playboy should have all rights and
3 remedies available to assert in that lawsuit.

4 So I'm not sure what this advisory
5 statement was that Mr. Kelly was making, but I want
6 to make clear if he's going to make an advisory
7 statement, my advisory statement back is let's go
8 litigate.

9 THE COURT: Well, let's not complicate the
10 matter.

11 The order will simply reflect that the
12 case is dismissed and all pending motions and
13 proceedings are stricken as moot.

14 Mr. Kelly, nobody's -- I understand
15 Playboy wants to do whatever it wants to do in the
16 Illinois State court action. And once the order is
17 entered, you can do that.

18 MR. KELLY: That's right.

19 I would like to confirm what Mr. Benevento
20 said, if it was confusing, is that we're not
21 suggesting that the claim cannot be pursued.

22 I think we would though like to have a
23 provision in the order that Mr. Boley volunteered or
24 agreed with is automatic stipulation -- make it very
25 clear that no automatic stay applies. It goes away

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1 with everything else.

2 THE COURT: Any objection to that?

3 MR. BOLEY: No, your Honor, my view is as
4 a matter of law the automatic stay terminates when
5 the case is dismissed.

6 MR. BECKETT: I'm not going to read 362
7 now. If I may inquire of, your Honor. May I ask
8 Mr. Kelly to write that little part of it, and I'll
9 slip it in and distribute it for people to comment?

10 THE COURT: I'd appreciate that.

11 MR. BECKETT: I'll give him a word limit.

12 THE COURT: Okay. All right. Thank you
13 very much for a --

14 MR. BECKETT: Thank you.

15 THE COURT: -- very professional
16 presentation.

17 Mr. Hawatmeh, thank you for your
18 testimony.

19 Mr. Miller, thank you for being here.

20 And good luck to the parties in resolving
21 their remaining disputes. Thank you.

22 MR. KELLY: Thank you, your Honor.

23 MR. BENEVENTO: Thank you, your Honor.

24 (Concluded at 11:33 a.m.)

25 --o0o--

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)


I, Tamra J. Berry, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

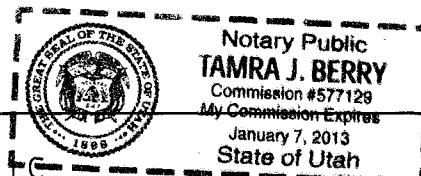
That on December 7, 2012, I transcribed an electronic recording;

That the testimony of all speakers was reported by me in stenotype and thereafter transcribed, and that a full, true, and correct transcription of said testimony is set forth in the preceding pages, according to my ability to hear and understand the tape provided;

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 11th day of December, 2012.


Tamra J. Berry CSR, RPR



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